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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

JENNIFER PURCELL, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. SPOKEO, INC., Defendant.	Case No. CV-10-03978 HRL **(1) NOTICE OF MOTION AND MOTION OF DEFENDANT SPOKEO, INC. TO DISMISS; AND** **(2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: April 26, 2011 Time: 10:00 a.m.

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Other Authorities

Encyclopedia Britannica, Search Engine,
http://www.britannica.com/EBchecked/topic/1017484/search-engine 10

Kristen J. Mathews & Christopher Wolf, "Financial Privacy Law," in *Proskauer on Privacy* § 2:2.2[C] (2010) 9

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on April 26, 2011, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 2 of the above-captioned Court, located at 280 South 1st Street, San Jose, California 95113, Defendant Spokeo, Inc. ("Spokeo"), by and through its undersigned attorneys, will move the Court to dismiss Plaintiff's Complaint under Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Civil Procedure 12(b)(1).

Spokeo's motion is supported by this Notice of Motion and Motion, the Memorandum of Points and Authorities (the "Memorandum"), the concurrently filed Request for Judicial Notice, the records on file in this action, and any oral argument that may be presented at the hearing on this motion. For the reasons provided in the Memorandum, Spokeo respectfully requests that the Court dismiss Plaintiff's complaint with prejudice because it fails to state a single claim, and this Court does not have subject matter jurisdiction over the action.

Dated: January 10, 2011

MAYER BROWN LLP
JOHN NADOLENCO
BARRETT L. SCHREINER

By: /s/ John Nadolenco
John Nadolenco
Attorneys for Defendant
SPOKEO, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff tries to fit a square peg into a round hole. Plaintiff, individually and on behalf of a putative class and subclass, attempts to apply a law first passed in 1970 meant to regulate credit reporting agencies and credit bureaus like TransUnion and Equifax to an Internet search engine. Plaintiff claims that Defendant Spokeo, Inc. ("Spokeo") violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (the "FCRA"), because Spokeo's search engine allegedly captured (from publicly available sources) some information about Plaintiff that is incorrect. But Internet search engines are not—and were not intended to be—"consumer reporting agencies" under the FCRA. Indeed, Plaintiff's Complaint, as well as matters subject to judicial notice, show that Spokeo has taken a slew of steps to ensure that users of its website (a) realize that the public information Spokeo gathers could be incorrect and (b) do not use any information for *any* purpose under the FCRA:

- Each page of search results on Spokeo's site tells users that "[a]ll data offered is derived from public sources" and that "Spokeo does not verify or evaluate each piece of data, and makes no warranties or guarantees about any of the information offered." The same page tells users that "Spokeo does not possess or have access to secure or private financial information" and that "Spokeo is not a credit reporting agency and does not offer consumer reports." Finally, the same page tells users that none of the information may be used for "determining any entity or person's eligibility for credit, insurance, employment, or for any other purposes covered under the FCRA."
- Spokeo's Terms of Use, which are binding on users, make the same types of disclosures.
- Before accessing financial information captured by the search, users must agree that "Spokeo is not a credit reporting agency and does not offer consumer reports" and, that users cannot use the search results for any purpose under the FCRA. Users also agree that "Spokeo makes no warranties or guarantees whatsoever regarding the information provided. Any reliance upon the information is at my own risk."

Despite these disclosures and agreements, Plaintiff still pretends that Spokeo is just like a credit bureau. But it isn't. It is an Internet search engine and simply not a "consumer reporting agency" under the FCRA. Thus, Plaintiff's FCRA claims fail.

Plaintiff's FCRA claims also fail for another reason: Spokeo is immune from the alleged liability under the Communications Decency Act ("CDA"). That act, which is specifically intended to apply to Internet companies, protects "interactive computer services" like Spokeo from liability when they merely pass along content created by third parties. Since Plaintiff concedes that Spokeo simply publishes personal information about individuals and acknowledges that the information is obtained from other sources [i.e., third parties] (*see* Compl. ¶¶ 1, 10, 19, 20, 23, 51, 61), it is immune from the alleged liability under the CDA.

Even if Spokeo was a "consumer reporting agency" and was not immune under the CDA, Plaintiff's claims still would fail. Plaintiff does not—presumably because she cannot—sufficiently allege that she was *actually harmed* by Spokeo's alleged conduct, except in the most bald and conclusory manner. *See* Compl. ¶¶ 24-25, 47-48. While Plaintiff alleges that Spokeo's website contains incorrect information about her, she never alleges facts explaining how the allegedly incorrect information led to actual harm. The best Plaintiff can do is allege in wholly conclusory fashion that she has been damaged, that she has experienced "out-of-pocket loss, fear, anxiety, and apprehension of fraud or loss of money," and that her information "has been and continues to be freely subject to lurking potential employers, bosses, business colleagues, dating partners, friends and foes at large." Compl. ¶¶ 24-25, 47. But Plaintiff's conclusory damages allegations and speculative and hypothetical allusions to possible future harm are simply not sufficient to confer Article III standing.

Plaintiff's claim under Illinois's Uniform Deceptive Trade Practices Act, 815 Ill. Comp. Stat. §510/1 *et seq.* (the "UDTPA"), likewise fails because Spokeo's conduct does not fall within the purview of that act. The UDTPA applies to two general types of deceptive conduct: misleading trade identification and false and deceptive advertising. But Plaintiff does not allege either of those claims. And even if she did, Plaintiff's UDPTA claim still fails because it does not apply to publishers of information and because Plaintiff has not adequately alleged injury for standing under the act.

Moreover, Plaintiff's claim for unjust enrichment fails because Plaintiff does not—and cannot—allege that Spokeo has obtained a benefit from her, or that Spokeo's conduct is unjust.

Finally, Plaintiff's claim for declaratory judgment and injunctive relief under 28 U.S.C. §§ 2201 and 2202 fails because that relief is premised on Plaintiff's FCRA and UDTPA claims, which fail.

In short, Plaintiff's Complaint should be dismissed with prejudice.

II. BACKGROUND

A. Spokeo.com

Spokeo is an Internet service provider that operates a search engine at http://www.spokeo.com. Compl. ¶ 2. As opposed to traditional search engines—like Yahoo!, Google, or Bing—Spokeo is a search engine focused on finding people, allowing users to connect with family, friends, business contacts, and others.[1] Request for Judicial Notice ["RJN"], Ex. A [About Spokeo, first paragraph].

As Plaintiff acknowledges, Spokeo gathers its information from publicly available sources, such as phone books, real estate listings, government records and social networking websites. *See* Compl. ¶¶ 10, 58, 61; *see also* RJN, Ex. A [About Spokeo, fifth paragraph]. In essence, Spokeo aggregates into a single search hundreds of public searches that a user would otherwise have to conduct individually. Spokeo does this by utilizing algorithms that navigate, sift through, and collect multitudes of scattered public data and synthesize that information into one summary. RJN, Ex. A [About Spokeo, third paragraph].

Once the user inputs search criteria, and assuming the criteria leads to search results,[2] the aggregated information is displayed on Spokeo's webpage, and divided into certain sections:

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[1] Because Plaintiff refers to and quotes Spokeo's website throughout the Complaint, the Court can take judicial notice of the relevant pages. *See* Request for Judicial Notice filed concurrently.

[2] In reality, however, Spokeo's searches yield no information for a great number of people, rendering Plaintiff's putative class definition unascertainable and leading to a staggering number of individualized issues.

Basic Profile, Household, Wealth, Lifestyle & Interests, and Neighborhood. Compl. ¶¶ 11, 36. Users also can subscribe to Spokeo's "premium benefits" to receive additional data results. The bottom of every search results page states:

> All data offered is derived from public sources. Spokeo does not verify or evaluate each piece of data, and makes no warranties or guarantees about any of the information offered. Spokeo does not possess or have access to secure or private financial information. Spokeo is not a credit reporting agency and does not offer consumer reports. None of the information offered by Spokeo is to be considered for purposes of determining any entity or person's eligibility for credit, insurance, employment, or for any other purposes covered under the FCRA.

RJN, Ex. D [Sample Search Page]. And in granting its users a license, Spokeo makes clear that users "may not use Spokeo.com in a manner that exceeds the rights granted for your use." RJN, Ex. B, [Terms of Use] § 2(a).

Additionally, before users can access the "Wealth" section of search results, users are required to agree to the following terms, presented in a pop-up screen:

> I understand and agree that: This section is intended for entertainment purposes only. All data is derived from public sources. Spokeo does not verify or evaluate each piece of information offered, or make any guarantees about its accuracy, authenticity, legality, or the time frame in which it may have been collected or updated. Spokeo is not a credit reporting agency and does not offer consumer reports. Spokeo does not possess or have access to secure or private financial information, such as Social-Security numbers, driver's license numbers, bank accounts, or credit scores. *None of the information offered by Spokeo is to be considered for purposes of determining a consumer's eligibility for credit, insurance, employment, or for any other purpose authorized under the FCRA.* Spokeo makes no warranties or guarantees whatsoever regarding the information provided. Any reliance upon the information is at my own risk. I further acknowledge that I have read and agree to all the provisions specified in Spokeo's Terms of Use, Privacy Policy and plan specifications.

(Emphasis added.) RJN, Ex. E [Wealth Section Pop-Up].

Plaintiff's Complaint admits that Spokeo makes references to the FCRA on its website. Compl. ¶ 46. In fact, Spokeo specifically discloses that "'The data provided to you by Spokeo may not be used as a factor in establishing a consumer's eligibility for credit, insurance, employment purposes, or for any other purpose authorized under the FCRA.'" RJN, Ex. B [Terms of Use] § 2(d). Paid subscribers agree to these terms by checking a box when creating their login and password signifying their agreement to be bound by Spokeo's Terms of Use. RJN, Ex. C [Assent to Terms].

While Plaintiff complains that Spokeo does not disclose a full list of sources it uses to generate the information it provides (Compl. ¶ 10), Plaintiff does not contend Spokeo has a duty to disclose a full list. In any event, Spokeo clearly discloses on its website that all data aggregated is derived from public sources. RJN, Ex. A [About Spokeo, second sentence]; Ex. B [Terms of Use] § 4 ("Spokeo aggregates publicly available information from phone books, social networks, marketing surveys, real estate listings, business websites, and other public sources"); Ex. D [Sample Search Page].

Because Spokeo simply aggregates publicly available information, it recognizes that some of the information could be inaccurate. Thus, Spokeo discloses:

> Spokeo does not verify this Public Information. Spokeo does not evaluate each piece of information provided and makes no guarantees to Spokeo users about the accuracy, legitimacy, or legality of any information or how recently any information was collected or updated. As a user of Spokeo.com, You agree that there are no warranties or guarantees whatsoever regarding the information provided. . . .

RJN, Ex. B [Terms of Use] § 4(b); *see also id.*, § 13(c) (warranty disclaimer). Spokeo also states that Spokeo "[d]ata is only as good as its source, and since no human involved, the data Spokeo aggregates is not verified and may not be entirely accurate." RJN, Ex. A [About Spokeo] ("Limitations"). Additionally, Spokeo allows users to remove their profiles if they prefer. *See* RJN, Ex. C [Terms of Use] § 4(c).

B. Plaintiff's Claims

Despite these disclosures, Plaintiff sues Spokeo under the FCRA, the UDTPA, and the law of unjust enrichment because its search results allegedly contain some incorrect information about her—though Plaintiff implies some of the information is correct. *See* Compl. ¶ 23. Plaintiff says that she has been damaged, "including out-of-pocket loss, fear, anxiety, and apprehension of fraud or loss of money," and indicates her concern that her personal information is available to "potential employers, bosses, business colleagues, dating partners, friends and foes at large." Compl. ¶ 24, 25, 47. But she never alleges any facts explaining how she has been damaged in any of these ways.

III. THE COURT SHOULD DISMISS ALL OF PLAINTIFF'S CLAIMS.

Spokeo moves to dismiss Plaintiff's Complaint in its entirety under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. In addition, Plaintiff moves to dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction because plaintiff lacks standing.

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "A claim has facial plausibility" only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*; *see also Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) ("We do not . . . necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations."); *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 683 (9th Cir. 2009) ("We need not accept Plaintiffs' unwarranted conclusion[s] in reviewing a motion to dismiss."). Courts insist upon "'specificity in pleading' . . . to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope'" of success. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007).

To survive a motion to dismiss for lack of standing, a complaint must plead the elements of standing in "the manner and degree of evidence required" at the pleading stage of litigation and provide "factual allegations of injury resulting from the defendant's conduct." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Plaintiff's Complaint fails to satisfy these standards.

A. Plaintiff Fails to State a Claim under the FCRA Because Spokeo Is Not a "Consumer Reporting Agency."

The gravamen of Plaintiff's case is that Spokeo violated the FCRA by failing to follow certain procedures required of consumer reporting agencies. But Spokeo is not a "consumer reporting agency" and does not issue "consumer reports" as defined by the FCRA. Specifically, Spokeo does not engage "in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." 15 U.S.C. § 1681a(f). Moreover, the information furnished by Spokeo to its users are not consumer reports because Spokeo does not gather or provide the information with the intent that it will be used for an FCRA purpose, warns its users of that, and warns its users that the gathered information—like so much else on the Internet—may be inaccurate.

Congress passed the FCRA in 1970 to promote efficiency and confidence in the nation's *banking system* by ensuring fair and accurate credit reporting. 15 U.S.C. § 1681(a). Accordingly, the FCRA establishes procedures for consumer reporting agencies to meet the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to consumers. *Id.* § 1681(b). "To accomplish this goal, the FCRA regulates the issuance and use of 'consumer reports' by 'consumer reporting agencies.'" *Am. Bankers Ass'n v. Gould*, 412 F.3d 1081, 1083 (9th Cir. 2005).

Only consumer reporting agencies, as defined in section 1681a of the FCRA, can be liable for claims under the FCRA. *See, e.g., Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 942 (9th Cir. 2009) ("[The FCRA's] strictures relate only to consumer reporting agencies."); *Mende v. Dun & Bradstreet, Inc.*, 670 F.2d 129, 134 (9th Cir. 1982) ("Under the [FCRA], if a reporting entity is not a consumer reporting agency within the meaning of the Act, then such entity cannot be held to have violated the statute, and dismissal is required."). The FCRA defines a "consumer reporting agency" as:

> any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers *for the purpose of furnishing **consumer reports*** to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

15 U.S.C. § 1681a(f) (emphasis added). Even assuming that Spokeo is in the business of regularly assembling information on consumers (and it is not), that alone would be insufficient to find that Spokeo is a consumer reporting agency because Spokeo does not provide "consumer reports":

> Given that the definition of a [consumer reporting agency] depends largely on the definition of "consumer report," the fact that a particular set of information is not

> a consumer report can prevent a person or entity from acting as a [consumer reporting agency] for the purposes of the Act. For example, a person or entity may meet part of the definitional requirements of a [consumer reporting agency] in that it "regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers." However, if that person or entity does not provide "consumer reports" to clients under the limited meaning of the Act, the person or entity is not a [consumer reporting agency] that "furnish[es] consumer reports to third parties" within the scope of the FCRA.

Kristen J. Mathews & Christopher Wolf, "Financial Privacy Law," in *Proskauer on Privacy* § 2:2.2[C] (2010). The FCRA defines "consumer report" as

> any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living *which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility* for—
>
> (A) credit or insurance to be used primarily for personal, family, or household purposes;
>
> (B) employment purposes; or
>
> (C) any other purpose authorized under section 1681b of this title.

15 U.S.C. § 1681a(d)(1) (emphasis added).

In determining whether a report constitutes a "consumer report" under the FCRA, courts generally look at (1) whether the person who requests the report uses it for one of the "consumer purposes" set forth in the FCRA; (2) whether the agency that prepares the report "expects" it to be used for one of the "consumer purposes" set forth in the FCRA; or (3) whether the agency which prepared the report originally collected the information contained in the report expecting it to be used for one of the "consumer purposes" enumerated in the FCRA. *Ippolito v. WNS, Inc.*, 864 F.2d 440, 449 (7th Cir. 1998); *Hansen v. Morgan*, 582 F.2d 1214, 1218 (9th Cir. 1978). The mere fact that a report *can be used* as a consumer report is not enough to make it one; it is the intent of the entity compiling the information that matters. *Mende*, 670 F.2d 129 at 133. *Mende* involved California Civil Code section 1785 *et seq.*, which defines "consumer credit report" nearly identically to the FCRA definition of consumer report. The court held that the defendants did not issue "consumer credit reports" because, among other things, they had entered into agreements with subscribers in which the subscribers agreed to use reports only for purposes outside of the California Credit Reporting Agencies Act. *Id.* at 132.

Here, Spokeo does not furnish "consumer reports" because it does not expect any information it provides to be used for "consumer purposes" and, in fact, warns its users in multiple ways that they should not—and cannot—use any information on Spokeo's site for such purposes. Spokeo takes extensive measures to ensure that the information it provides *is not used for FCRA purposes*. Spokeo includes a notice at the bottom of every search-results page that states that "*None of the information offered by Spokeo is to be considered for purposes of determining any entity or person's eligibility for credit, insurance, employment, or for any other purposes covered under the FCRA.*" RJN, Ex. D [Sample Search Page] (emphasis added). In addition, Spokeo's Terms of Use specifically precludes users from using *any* information on Spokeo's site for an FCRA purpose. *Id.*, Ex. B [Terms of Use] § 2.[3] To get access to full search results, paid subscribers must check a box that signifies their agreement to be bound by the Terms of Use. RJN, Ex. C [Assent to Terms]. And before users can access the wealth section of search results, users are required to agree that they will not use the information, which could be incorrect, for FCRA purposes. RJN, Ex. E [Wealth Section Pop-Up].

In short, the myriad of disclaimers and agreements stating that the information Spokeo provides cannot be used for FCRA purposes—and noting that the information could well be incorrect—precludes Plaintiff from now alleging the exact opposite. Equally significant, the

[3] Courts have repeatedly held that websites' terms of use are enforceable against the site's users. *See, e.g.*, *United States v. Drew*, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009) (a "visitor" to the website at issue was bound by the website's browsewrap agreement, which is essentially "a notice that—by merely using the services of, obtaining information from, or initiating applications within the website—the user is agreeing to and is bound by the site's terms of service"); *Id.* at 461-62 ("It cannot be considered a stretch of the law to hold that the owner of an Internet website has the right to establish the extent to (and conditions under) which members of the public will be allowed access to information, services and/or applications which are available on the website. Nor can it be doubted that the owner can relay and impose those limitations/restrictions/conditions by means of written notice such as terms of service or use provisions placed on the home page of the website. . . . [T]he vast majority of the courts (that have considered the issue) have held that a website's terms of service/use can define what is (and/or is not) authorized access vis-à-vis that website.") (citations omitted); *Fractional Villas, Inc. v. Tahoe Clubhouse*, No. 08-cv-1396 IEG POR, 2009 WL 465997, at *3 (S.D. Cal. Feb. 25, 2009) ("Courts have held that a party's use of a website may be sufficient to give rise to an inference of assent to the Terms of Use contained therein (so called 'browsewrap contracts').") (citing cases).

various disclosures, agreements and Terms of Use clearly show that Spokeo does not intend its reports to be used for FCRA purposes. Nor does it collect the information in its reports expecting it to be used for FCRA purposes. The website makes crystal clear that Spokeo does not intend the information it provides to be used for FCRA purposes. Thus, Plaintiff's FCRA claims fail.

Indeed, Spokeo is not remotely similar to the types of entities that courts have found are consumer reporting agencies. The three major credit reporting agencies, Trans Union, Equifax, and Experian, are consumer reporting agencies under the FCRA. *See, e.g., Fed. Trade Comm'n v. Gill*, 265 F.3d 944, 948 (9th Cir. 2001); *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 379 (C.D. Cal. 2007); *Myers v. Bennett Law Offices*, 238 F. Supp. 2d 1196, 1201 (2002). Unlike these companies, Spokeo—like Yahoo!, Google, or Bing—is a search engine.[4] A search engine bears no substantive resemblance in function, purpose, or essence to a consumer reporting agency as defined under the FCRA. It is therefore not surprising that no federal court has ever found a search engine to be a consumer reporting agency or to issue consumer reports within the meaning of the FCRA.

Spokeo is far more similar to companies that courts have found are *not* consumer reporting agencies under the FCRA. For example, at least one Circuit Court of Appeals has refused to find that another kind of popular online service that compiles otherwise publicly available information is a consumer reporting agency. In *McCready v. eBay, Inc.*, plaintiff complained that eBay's "feedback profile" contained false and misleading comments made by other eBay users in violation of the FCRA. 453 F.3d 882, 889 (7th Cir. 2006). Explaining that the FCRA only applies to consumer reports that are used for consumer purposes, and does not apply to reports utilized for business, commercial, or other professional purposes, the Seventh

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[4] A "search engine" is a "computer program to find answers to queries in a collection of information, which might be a library catalog or a database but is most commonly the World Wide Web. A Web search engine produces a list of "pages"—computer files listed on the Web—that contain the terms in a query. Most search engines allow the user to join terms with *and*, *or*, and *not* to refine queries. They may also search specifically for images, videos, or news articles or for names of Web sites." Encyclopedia Britannica, Search Engine, http://www.britannica.com/EBchecked/topic/1017484/search-engine (last visited Oct. 4, 2010).

Circuit held that eBay's feedback forum is not a consumer report and eBay is therefore not a consumer reporting agency. *Id.*

The same is true here. Spokeo's Internet search results are simply not consumer reports. Thus, Spokeo is not a "consumer reporting agency."

Nor is Spokeo is a "nationwide specialty consumer reporting agency" under the FCRA. Compl. ¶ 38. FCRA defines a nationwide specialty consumer reporting agency as "a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis relating to (1) medical records or payments; (2) residential or tenant history; (3) check writing history; (4) employment history; or (5) insurance claims." 15 U.S.C. § 1681a(w). Spokeo does not meet this definition for two reasons. First, it is not a "consumer reporting agency" for the reasons discussed. Second, Plaintiffs do not allege that Spokeo maintains files relating to medical records, check-writing history, employment history or insurance claims, and alleges that Spokeo maintains files on residential or tenant history in only the most conclusory and inadequate manner. *See* Compl. ¶ 38.

In short, Spokeo is not a "consumer reporting agency" and Plaintiff's First claim for relief fails, as do the portions of her Second, Third, and Fourth claims that rely on the FCRA claims.

B. Spokeo Is Immune Under the Communications Decency Act.

Search engines like Google, Yahoo, and Spokeo have long enjoyed immunity under the CDA. *See, e.g.*, *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105-06 (9th Cir. 2009) (upholding motion to dismiss to plaintiff's cause of action for negligent provision of services due to Yahoo's immunity under the CDA); *Black v. Google Inc.*, No. 10-02381 CW, 2010 WL 3222147, at *3-4 (N.D. Cal. Aug. 13, 2010) (granting motion to dismiss, due to CDA immunity, because claims were based on anonymous comment on Google's website by a third party); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1201 (N.D. Cal. 2009) (granting motion to dismiss, due to Google's immunity under the CDA, to plaintiff's complaint regarding Google's alleged involvement in fraudulent advertisements appearing through its web search function). The CDA provides that "[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c). According to the Ninth Circuit, Congress' objectives in enacting 47 U.S.C. § 230 ("Section 230") were "'(1) to promote the continued development of the Internet and other interactive computer services and other interactive media'" and "'(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.'" *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003) (quoting 47 U.S.C. § 230(b)).

The Ninth Circuit has explained that "Section 230 of the CDA immunizes providers of interactive computer services against liability arising from content created by third parties." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc). In other words, under the CDA, if a website operator "passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content," and will enjoy immunity for that content from liability that would otherwise attach under state or federal law.[5] *Id.* Reviewing courts have treated CDA "immunity as quite robust, adopting a relatively expansive definition of 'interactive computer service.'" *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003).

In *Carafano*, the Ninth Circuit concluded that Section 230 protected against a third-party's publication of allegedly incorrect and defamatory remarks on a website. *Id.* at 1125. Significantly, the court upheld immunity, stating that, "despite the serious and utterly deplorable consequences that occurred in this case, . . . Congress intended that service providers such as [defendant] be afforded immunity from suit." *Id.* at 1125. This holding was required under the CDA, because the content at issue was provided by a third-party, not the website itself: "Under § 230(c) . . . so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process." *Id.* at 1124; *see also Ben Ezra, Weinstein, & Co., Inc. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (Internet service provider not liable for mistaken stock information

[5] Section 230 preempts any inconsistent state law. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 334 (4th Cir. 1997) ("it is equally plain that Congress' desire to promote unfettered speech on the Internet must supersede conflicting common law causes of action").

provided by independent third party organizations); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (Internet service provider not liable for message posted by unidentified member on online message board); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D. Col. 1998) (Internet service provider not liable for defamatory article written exclusively by independent third party contractor). Thus, three elements are required for CDA section 230 immunity: "(1) the defendant must be a provider or user of an 'interactive computer service;' (2) the asserted claims must treat the defendant as a publisher or speaker of information; and (3) the challenged communication must be 'information provided by another information content provider.'" *Batzel v. Smith*, 333 F.3d at 1037 (Gould, J., concurring in part, dissenting in part).

Here, the CDA is far more specific—and thus applicable—than the more general FCRA. *See Hellon & Associates, Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992) (the later, more specific statute controls over an earlier, more general statute). And Spokeo easily satisfies each of the CDA's elements.

First, it is an "interactive computer service." An "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). In this case, Plaintiff admits that Spokeo is a website (i.e., an information service or system) and provides an information service by allowing multiple third-party users to access the collected information via Spokeo's computer servers. *See* Compl. ¶¶ 2, 8, 11, 20.

Second, Plaintiff readily admits that her claims treat Spokeo as a publisher of information. *See* Compl. ¶¶ 19, 20, 23, 51, 61. Indeed, Plaintiff claims (incorrectly) that Spokeo publishes "consumer reports." Compl. ¶ 36. Moreover, simply aggregating or reorganizing information it obtains from other content providers does not in any way compromise Spokeo's CDA immunity. *See Carafano*, 339 F.3d at 1124 (defendant that classifies information provided by third party users into discreet categories and collects responses to questions does not transform defendant into a "developer" of the underlying information); *Batzel*, 333 F.3d at 1031 n.18 ("courts have agreed that the 'exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content' do not transform an individual into a 'content provider' within the meaning of § 230."); *Goddard*, 640 F. Supp. 2d at 1196 ("[A] website operator does not become liable as an 'information content provider' merely by 'augmenting the content [of online material] generally.'") (alteration in original) (quoting *Fair Hous. Council of San Fernando Valley*, 521 F.3d at 1167-68).

Third, since Plaintiff acknowledges that Spokeo just republishes information from third parties sources (*see* Compl. ¶¶ 10, 58, 61), she also admits that the challenged communication was provided by another information content provider. Indeed, Spokeo's site confirms that it obtains information from other publicly available sources. RJN, Ex. A [About Spokeo]; RJN, Ex. D [Sample Search Page].

As a result, Spokeo is immune from liability under the CDA and Plaintiff's claims fail for this additional reason.

C. The Court Should Dismiss the Complaint Because Plaintiff Has Not Alleged Sufficient Injury for Article III Standing.

"It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Before the Court can consider the merits of a legal claim, "the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue." *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990). To satisfy the standing requirements of Article III of the Constitution,

> a plaintiff must show that (1) it has suffered an "injury-in-fact" that is both (a) concrete and particularized and (b) actual or imminent, *not conjectural or hypothetical*; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc., 528 U.S. 167, 180-81 (2000) (citing *Lujan*, 504 U.S. at 560-61) (emphasis added). The plaintiff bears the burden of establishing the elements of standing. *Lujan*, 504 U.S. at 560.

Here, Plaintiff cannot come close to establishing Article III standing. Except for the most superficial and insufficient conclusory allegations (*see* Compl. ¶¶ 24, 25, 47, 48, 62),[6] Plaintiff has not adequately alleged that she has suffered any injury because of Spokeo's alleged conduct. The best Plaintiff can do is allege in wholly conclusory fashion that she has been damaged, that she has experienced "out-of-pocket loss, fear, anxiety, and apprehension of fraud or loss of money," and that her information "has been and continues to be freely subject to lurking potential employers, bosses, business colleagues, dating partners, friends and foes at large." Compl. ¶¶ 24-25, 47, 62. But Plaintiff's conclusory damages allegations and speculative and hypothetical allusions to possible future harm are not sufficient to confer Article III standing. To be sure, conclusory allegations of harm "do not establish the injury-in-fact requirement of standing." *Native Am. Arts, Inc. v. Specialty Merch. Corp.*, 451 F. Supp. 2d 1080, 1082 (E.D. Cal. 2006) (stating that conclusory allegations referring to "competitive injury," "advertising injury," and "other damages" are insufficient to establish the injury-in-fact requirement of standing); *see also KEMA, Inc. v. Koperwhats*, No. C 09-1587 MMC, 2010 U.S. Dist. LEXIS 90803, at *20-21 (N.D. Cal. Sept. 1, 2010) ("Plaintiffs' conclusory allegation that defendants' false designations of origin have caused and will continue to cause damage to Plaintiffs . . . is insufficient.") (internal quotations omitted). And, as the United States Supreme Court stated, "[a]llegations of possible future injury do not satisfy the requirements of Article III. A threatened injury must be 'certainly impending' to constitute injury in fact." *Whitmore*, 495 U.S. at 158 (citations omitted). Indeed, federal courts have consistently held that vague allegations of future conjectural, speculative, and hypothetical harm, such as Plaintiff's, do not state a sufficient injury to meet Article III standing requirements. *See, e.g., Snake River Farmers' Ass'n v. Dep't of Labor*, 9 F.3d 792, 798 (9th Cir. 1993) (the "some day" speculative possibility that the Department of Labor's wage-rate determinations could harm future employment interests is insufficient to establish injury-in-fact); *AFGE v. Clinton*, 180 F.3d 727, 731 (6th Cir. 1999)

[6] *Iqbal*, 129 S. Ct. at 1949 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Twombly*, 550 U.S. at 555 (allegations in a complaint require "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action").

(harm to plaintiffs' employment prospects is insufficiently concrete and particularized to establish Article III standing); *Jones v. Stancik*, No. 02 CV 4541 (SJ), 2004 WL 2287779, at *5 (E.D.N.Y. Oct. 4, 2004) (allegations that defendant's actions, *inter alia*, imposing on plaintiff a stigma or other disability that could foreclose her employment opportunities too vague to demonstrate an injury-in-fact).

Moreover, even where statutory damages are available, plaintiffs still must show an injury-in-fact to meet Article III's standing requirements. *Gomez v. Alexian Bros. Hospital*, 698 F.2d 1019, 1020-21 (9th Cir. 1983) (stating that Article III standing to assert statutory rights requires "'that the plaintiff allege that as a result of the defendant's actions he has suffered a distinct and palpable injury.'") (quoting *Haven's Realty Corp v. Coleman*, 455 U.S. 363, 372 (1982) (internal quotations omitted); *Lee v. Chase Manhattan Bank*, No. C07-04732 MJJ, 2008 WL 698482, at *5 (N.D. Cal. Mar. 14, 2008) ("[T]he mere allegation of a violation of a . . . statutory right, without more, does not confer Article III standing. A plaintiff invoking federal jurisdiction must also allege some actual or imminent injury resulting from the violation . . . ."); *Native Am. Arts, Inc.* at 1083 ("[a]lthough plaintiff may not ever be called upon under the [federal statute] to prove any actual damages in this action, Article III of the United States Constitution requires proof of such damages in order to have access to the federal courts to establish and collect upon such a claim."). In fact, the Eighth Circuit recently stated in a FCRA case that,

> [i]t does not necessarily follow from [the language of 15 U.S.C. § 1681n(a)(1)(A)] that statutory damages are available where a plaintiff fails to prove actual damages. A reasonable reading of the statute could still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award.

Dowell v. Wells Fargo Bank, NA, 517 F.3d 1024, 1026 (8th Cir. 2008). *But see, e.g.*, *Hernandez v. Chase Bank USA, N.A.*, 429 F. Supp. 2d 983, 989 (N.D. Ill. 2006).

Here, as noted, Plaintiff does not—presumably because she cannot—adequately allege facts suggesting that she *actually* has been harmed by Spokeo's conduct. She only makes conclusory allegations of injury and allusions to speculative and hypothetical harm. But she never alleges any *facts* alleging describing how she was harmed. Her speculation about what *might* happen is simply insufficient to establish Article III standing. Thus, her federal claims fail for this additional reason.

Plaintiff's declaratory relief and injunction request in her fourth count does not change the outcome. As an initial matter, injunctive and declaratory relief is not available under the FCRA. *Yasin v. Equifax Info. Servs.*, No. C-08-1234 MMC, 2008 WL 2782704, at *2-4 (N.D. Cal. July 16, 2008). But even if such relief was available, the injury-in-fact required to seek injunctive relief is in some ways stricter than that required to seek damages: "Article III standing requires an injury that is actual or imminent, not conjectural or hypothetical," and "*[i]n the context of injunctive relief, the plaintiff must demonstrate a real or immediate threat of an irreparable injury*." *Clark v. City of Lakewood,* 259 F.3d 996, 1007 (9th Cir. 2001) (emphasis added). In this case, Plaintiff's conclusions and speculative concern about what might happen certainly are not sufficient under federal standards to plead real or immediate threat of irreparable injury. Thus, Plaintiff's prayer for injunctive and declaratory relief is insufficient to confer standing.

Finally, Plaintiff's putative class claims also cannot confer standing. Plaintiff must sufficiently allege that she personally has been injured, not that injury has been suffered by other, unidentified members of the class to which she belongs and which she purports to represent. *Warth v. Seldin*, 422 U.S. 490, 502 (1975); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) ("That a suit may be a class action . . . adds nothing to the question of standing."). Since Plaintiff cannot plead the requisite case or controversy between herself and Spokeo, she also may not seek relief on behalf of herself or any other member of the class. *Warth*, 422 U.S. at 502 (citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)).

In short, Plaintiff does not have Article III standing, and this Court should dismiss the Complaint in its entirety for failure to state a claim and lack of subject matter jurisdiction.

D. Plaintiff's UDPTA Claim Also Fails.

Plaintiff's UDPTA claim also tries to fit a square peg into a round hole. Plaintiff purports to state a cause of action against Spokeo for business conduct that no court has ever found falls within the UDTPA. The UDTPA was created to "stem unfair competition and the deceptive trade practices singled out can be classified roughly into either misleading trade identification or false and deceptive advertising." *Barliant v. Follett Corp.*, 483 N.E.2d 1312, 1317 (Ill. App. Ct. 1985); *see also Zeller v. LaHood*, 627 F. Supp. 55, 60 (C.D. Ill. 1985) ("Although there are 12 activities, 11 specific and one catch-all, which can constitute deceptive trade practices, the Act effectively delineates two prohibited forms of action. The first is 'passing off' the goods or services of another and the second is causing a likelihood of confusion by some pattern of designation or representation in conjunction with good or services."); *Juno Online Servs., L.P. v. Juno Lighting, Inc.*, 979 F. Supp. 684, 692 (N.D. Ill. 1997) ("It is clear from the language of the statute and the accompanying comments written by The National Conference of Commissioners on Uniform State Laws that the aim of this law is to prevent misrepresentation via trademark or advertising."). Spokeo's conduct, as alleged, does not have anything to do with misleading trade identification or false and deceptive advertising that the UDTPA actually covers. *See Barliant*, 483 N.E. 2d at 1317.

Plaintiff appears to bring her cause of action for injunctive relief under the UDTPA under two (inapplicable) provisions, 815 Ill. Comp. Stat. § 510/2(a)(2) and (12). *See* Compl. ¶¶ 57, 58. Those provisions provide:

> A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, the person: . . .
>
> (2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services; . . .
>
> (12) engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding.

815 Ill. Comp. Stat. § 510/2(a)(2), (12). Thus, "[t]he elements of a § [510/2(a)(2)] violation [are] deceptive conduct that (1) causes a likelihood of confusion or of misunderstanding as to (2) the source, sponsorship, approval or certification of (3) good or services." *Stephen & Hayes Constr. v. Meadowbrook Homes Inc.*, 988 F. Supp. 1194, 1198 (N.D. Ill. 1998) (citing 815 Ill. Comp. Stat. § 510/2(2)). Moreover, under the UDTPA, "'likelihood of confusion' has the same meaning . . . as it has in trademark infringement cases," thus "'[l]ikelihood of confusion' exists when the defendant's use of a deceptive trade name, trademark, or other distinctive symbol is

likely to confuse or mislead consumers as to the source or origin of the product or service." *Hooker v. Columbia Pictures Indus.*, 551 F. Supp. 1060, 1064 (N.D. Ill. 1982); *see also Lorillard Tobacco Co. v. Elston Self Serv. Wholesale Groceries, Inc.*, No. 03 C 4753, 2009 WL 1635735, at *5 (N.D. Ill. June 9, 2009) ("The focus is whether there is a likelihood of confusion over the *origin* of the product."); *North American Bear Co. v. Carson Pirie Scott & Co.*, No. 91 C 4550, 1991 WL 259031, at *5 (N.D. Ill. Nov. 27, 1991) ("Likelihood of confusion exists when the defendant's use of a deceptive trade name, trademark, or other distinctive symbol is likely to confuse or mislead customers as to the source or origin of the product.").

Here, however, Plaintiff does not allege that Spokeo's conduct is anything like the practices subject to the UDPTA or causes a "likelihood of confusion." For starters, Plaintiff does not allege that anything Spokeo did caused likely confusion about the source of the services that Spokeo provides. 815 Ill. Comp. Stat. § 510/2(a)(2). Indeed, Spokeo's site discloses that it simply collects information that is publicly available elsewhere, that it does not verify the public information it aggregates, that it makes no guarantees about the information's accuracy, and that it ensures that its users agree that there are no warrantees or guarantees whatsoever regarding the information provided and that they rely on the information at their own risk. RJN, Ex. B, § 4(b) [Terms of Use].

Plaintiff's reliance on 815 Ill. Comp. Stat. § 510/2(a)(12) is similarly misplaced. Under that provision, "a person engages in a deceptive trade practice when he engages in conduct which similarly to the activities specifically listed 'creates a likelihood of confusion or of misunderstanding.'" *Fitzgerald v. Chicago Title & Trust Co.*, 380 N.E.2d 790, 794 (Ill. 1978); *see also Lionel Trans, Inc. v. Albano*, 831 F. Supp. 647, 651 (N.D. Ill. 1993) ("Section [2(a)(12)] adds little to the language of the Act standing alone."); *Beard v. Gress*, 413 N.E.2d 448, 453 (Ill. App. Ct. 1980) ("[T]he word 'similarly' limits the 'other conduct' of subparagraph 12 to that of like kind or quality as that stated in the several subparagraphs of that Act."). However, none of Spokeo's alleged conduct is similar to the activities listed in subparagraphs (1) through (11) of § 510/2(a), which generally cover misleading trade identification or false and deceptive advertising. *See Barliant*, 483 N.E. 2d at 1317. In addition, Plaintiff inappropriately conflates the alleged confusion and misunderstanding created by some inaccurate information on Spokeo's website with the technical meaning of "likelihood of confusion and misunderstanding" on which the UDPTA is premised. The UDPTA is not concerned about a service that provides some inaccurate information from unauthenticated sources, where such inaccuracies are disclosed, but rather with trademark infringement-like confusion and misunderstanding related to the source or origin of the service. *See Hooker*, 551 F. Supp. at 1064. Thus, Plaintiff clearly misconstrues the UDPTA, which simply does not apply here.

Even if Spokeo's alleged conduct falls within the purview of the UDPTA, Plaintiff's claim still fails. The UDPTA "does not apply to: . . . publishers, broadcasters, printers or other persons engaged in the dissemination of information or reproduction of printed or pictorial matter who publish, broadcast or reproduce material without knowledge of its deceptive character." 815 Ill. Comp. Stat. § 510/4(2). As described in Section III.B, Spokeo is a publisher of information on the Internet. Plaintiff does not—and cannot—allege that Spokeo published information about her with knowledge of its allegedly deceptive character. Indeed, Plaintiff admits that Spokeo simply aggregates information publicly available elsewhere. *See* Compl. ¶¶ 10, 58, 61 Therefore, the UDPTA does not apply to Spokeo for this additional reason.

Finally, Plaintiff's UDPTA claim also fails because she cannot adequately allege harm. "To state a cause of action for injunctive relief [under the UDPTA], a plaintiff must minimally allege that he is likely to be damaged by another's deceptive trade practice." *Greenberg v. United Airlines*, 563 N.E.2d 1031, 1037 (Ill. App. Ct. 1990) (citation omitted); *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 904 F. Supp. 818, 822 (N.D. Ill. 1995) ("The Act does . . . limit standing to 'a person likely to be damaged by a deceptive trade practice.'" (citing 815 Ill. Comp. Stat. § 510/3)). Here, Plaintiff simply parrots the statutory language but does not allege *facts* showing that she is likely to be damaged. *See* Compl. ¶ 62; *Twombly*, 550 U.S. at 555; *Iqbal*, 129 S. Ct. at 1949. Her speculative concern about what may happen is simply not enough.

Since Plaintiff's UDTPA claim fails, the Court should dismiss Plaintiff's Third Claim for Relief.

E. The Court Should Dismiss Plaintiff's Unjust Enrichment Claim.

Unjust enrichment is a quasi-contractual theory or based on a contract implied in law. *Ward v. Taggart*, 51 Cal. 2d 736, 742 (1959) ; *People ex rel. Hartigan v. E & E Hauling, Inc.*, 607 N.E.2d 165, 177 (Ill. App. Ct. 1992) ("The theory of unjust enrichment is based on a contract implied in law.").[7] Plaintiff must plead and prove "receipt of a benefit and unjust retention of the benefit at the expense of another." *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723, 726 (2000); *see also Fortech, L.L.C. v. R.W. Dunteman Co.*, 852 N.E.2d 451, 462-63 (Ill. App. Ct. 2006) ("A plaintiff may recover under the theory of unjust enrichment if the defendant unjustly retained a benefit to the plaintiff's detriment, and defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." (internal quotations omitted)). Furthermore, an action for restitution for unjust enrichment lies where the plaintiff confers a benefit upon the defendant. *See Young v. Bank of Cal.*, 88 Cal. App. 2d 184, 187 (1948); *MC Baldwin Fin. Co. v. DiMaggio*, 845 N.E.2d 22, 30 (Ill. App. Ct. 2006) ("An award of restitution is designed to prevent unjust enrichment by disgorging the benefit conferred to the defendant by the plaintiff.").

Plaintiff has flatly failed to state these elements. First, Plaintiff's statement that she conferred a benefit on Spokeo is not supported by any factual allegations (or common sense), is wholly conclusory, and does not come close to meeting the pleading standards of *Twombly* and *Iqbal*. *See Twombly*, 550 U.S. at 555; *Iqbal*, 129 S. Ct. at 1949. Plaintiff alleges that "Spokeo has knowingly received and retained benefits from Plaintiff and other Class members under circumstances that would render it unjust to allow Spokeo to retain such benefits." Compl. ¶ 50. Completely absent from the Complaint are any factual allegations stating, or even hinting at, what benefits Plaintiff might have conferred on Spokeo. Indeed, it is hard to imagine *any* benefit Plaintiff might have conferred on Spokeo. Thus, Plaintiff has failed to sufficiently plead her unjust enrichment claim.

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[7] It is not certain whether Plaintiff believes that Illinois or California law applies to Plaintiff's unjust enrichment claim. However, the relevant legal principals are substantially similar. Thus, in most situations, the law of both states has been cited.

Second, Plaintiff fails to sufficiently plead that anything about Spokeo's conduct is unjust, wrong, or otherwise violates the fundamental principles of justice, equity, and good conscience. Plaintiff states that Spokeo markets, publishes, and sells "profiles of individuals including false, inaccurate and unverified information without obtaining the consent of those individuals." Compl. ¶ 51. But Plaintiff does not—and cannot—allege that it is unjust for a website to aggregate information from third-party sources, even if some of that information may be inaccurate. This is especially true where, as here, the site explains to its users that it obtains all of its information from publically available resources, and that the information is unverified and may be inaccurate. *See* discussion *supra* at page 20; RJN, Ex. B, § 4(b) [Terms of Use]. Certainly, if a claim for unjust enrichment would lie wherever inaccurate information was posted on the Internet, or an imperfect product or service was marketed and sold, the courts would be inundated with such cases. In the end, simply passing through information on the Internet is not unjust, especially where a disclaimer is present.

Plaintiff also seems to premise her claim for unjust enrichment on Spokeo's alleged violations of the FCRA. Thus, her unjust enrichment claim should fail along with her FCRA claim.

F. Plaintiff's Equitable Claims Also Fail.

Plaintiff seeks "declaratory judgment as to whether Spokeo's mass marketing, publication and/or sale of consumer reports about Plaintiff and the Class violates the FCRA and the [U]DPTA, and the common law of unjust enrichment." Compl. ¶ 71. As noted, injunctive and declaratory relief is not available under the FCRA. *See Yasin v. Equifax Info. Servs.*, No. C-08-1234 MMC, 2008 WL 2782704, at *2-4 (N.D. Cal. July 16, 2008). In any event, because Plaintiff's underlying claims fail, so do her claims for declaratory and injunctive relief likewise fail.

Further, even if this Court does not dismiss Plaintiff's other claims, Plaintiff's claims for declaratory and injunctive relief should, nonetheless, be dismissed as redundant of other relief sought. *See United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) ("Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." (citations omitted)); *Gwin v. Pac. Coast Fin. Servs.*, No. 09-cv-2734 BTM (BLM), 2010 WL 1691567, at *7 (S.D. Cal. Apr. 23, 2010) (dismissing claim for declaratory and injunctive relief where "the declaratory relief Plaintiffs seek is entirely commensurate with the relief sought through their other causes of action," and "[t]hus Plaintiffs' declaratory relief claim is duplicative and will neither serve a useful purpose in clarifying legal relations nor terminate the proceedings").

Thus, the Court should dismiss Plaintiff's fourth claim.

IV. CONCLUSION

Spokeo respectfully requests that the Court dismiss the Complaint with prejudice because none of the defects in the Complaint can be cured.

Dated: January 10, 2011

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